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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 914

CHARLES L. MCNALLY, PETITIONER

v.

HENRY C. HILL, WARDEN OF UNITED STATES NORTHEASTERN PENITENTIARY, LEWISBURG, PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 47–49) has not been reported. The opinion of the Circuit Court of Appeals (R. 53–59) is reported in 69 F. (2d) 38.

JURISDICTION

The judgment sought to be reviewed was entered February 13, 1934 (R. 60). The petition for writ of certiorari was filed March 31, 1934. While petitioner does not so state, he presumably invokes the

jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The two questions which the petitioner states are presented by his petition for writ of certiorari may be thus restated as one question:

Whether the petitioner is entitled to be relieved on habeas corpus from serving the sentence imposed upon the third count of one of the two indictments upon which he was convicted, because that count charged him with having unlawfully sold a stolen motor vehicle which "had theretofore been transported in interstate commerce", instead of charging him, in the language of the National Motor Vehicle Theft Act, with having sold a stolen motor vehicle "moving as, or which is a part of, or which constitutes interstate commerce."

STATUTE INVOLVED

Sections 4 and 5 of the National Motor Vehicle Theft Act (Act of October 29, 1919), c. 89, 41 Stat. 324, 325 (U.S.C., Title 18, Sec. 408), read as follows:

> SEC. 4. That whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more

than $5,000, or by imprisonment of not more than five years, or both.

SEC. 5. That any person violating this Act may be punished in any district in or through which such motor vehicle has been transported or removed by such offender.

STATEMENT

Two indictments, one containing three counts and another containing a single count, were returned against the petitioner in the District Court of the United States for the Eastern District of New York. The first count of the indictment containing three counts, which will hereafter, for purposes of brevity, be called Indictment 28944, charged petitioner and others with conspiring to transport a number of stolen automobiles in interstate commerce and with conspiring to receive, conceal, barter, and sell the automobiles so transported (R. 12–20). The second count charged the defendants with the interstate transportation of a stolen motor vehicle (R. 20–21). The third count, which is the one here involved, charged that (R. 22–23):

> the defendants, on or about the 12th day of February 1930, at Jersey City, in the State of New Jersey, did unlawfully, knowingly, and wilfully, sell a certain motor vehicle, to wit: a Lincoln Sedan, 1929 model, original motor number 59638, original serial number 59638, which said motor vehicle had theretofore been transported in interstate com-

> merce, from the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, to Jersey City, in the State of New Jersey, and which said motor vehicle had theretofore been stolen from the true owner thereof, on or about the 14th day of December 1929, at the Borough of Brooklyn, County of Kings, City, State, and Eastern District of New York, the said defendants knowing that the said car so stolen as aforesaid, had been stolen and transported in interstate commerce; * * *

It is charged in overt act one, of the conspiracy count, that the same vehicle was transported by the defendants from Brooklyn, N.Y., to Jersey City, N.J., on February 3, 1930, nine days before the vehicle was sold (R. 15).

The other indictment, to be hereafter called Indictment 28945, charged the petitioner and others with conspiring to transport another stolen motor vehicle in interstate commerce and with conspiring to receive, conceal, barter, and sell this vehicle (R. 26–31).

Petitioner was convicted upon all of the counts of these two indictments (R. 24, 34). Under Indictment 28944 he was sentenced to imprisonment for two years on the first count (the conspiracy count), and to imprisonment for four years on each of the two remaining counts. The judgment provided, however, that the sentence on the first count should be served concurrently with the sentences on the second and third counts,

and that the sentences on these counts should run consecutively. (R. 24.) The commitment issued in connection with these sentences provided that the sentences should date from November 30, 1931 (R. 35–36). On Indictment 28945 petitioner was sentenced to imprisonment for two years (R. 34), the commitment providing that the sentence should date from December 10, 1931 (R. 39). It is evident, therefore, that the aggregate sentence imposed upon the petitioner under the two indictments was eight years.

Petitioner did not appeal from these judgments but entered promptly upon the execution of his sentences (R. 37, 40).

On April 6, 1933, petitioner filed in the District Court of the United States for the Middle District of Pennsylvania a petition for writ of habeas corpus (R. 3–9), in which he alleged that he was then serving the sentences imposed upon him under the two indictments in the United States Penitentiary at Lewisburg, Pennsylvania. He sought in this petition to be relieved of the sentence of imprisonment imposed upon him under the third count of Indictment 28944, upon the grounds hereinafter stated. No attack was made upon the validity of the sentences imposed upon the other counts of the two indictments and petitioner admitted that he could be validly imprisoned for a term of four years (R. 7). He alleged that he had served one third of such valid four-year term; that he had vio-

lated none of the rules of the penitentiary; that his behavior had otherwise been good; and that he was therefore eligible to apply for a parole.

No attack was made in the petition for writ of habeas corpus upon the third count of Indictment 28944 upon the ground here urged, the petition alleging merely that the District Court for the Eastern District of New York was without power to impose the four-year sentence upon this count because the offense charged therein was committed outside of the territorial limits of that District, the sale of the vehicle having occurred in Jersey City, N.J. (R. 6–7).

In response to the petition for writ of habeas corpus an order was issued directing the warden of the penitentiary to show cause why the petition should not be granted (R. 10). After a hearing the District Court dismissed the petition and discharged the order to show cause (R. 1, 49). It held that under the National Motor Vehicle Theft Act venue may be laid in any district in or through which the stolen motor vehicle has been transported or removed, and that the Eastern District of New York was one of such districts. The court further held that the right of a defendant to be tried in the State and District wherein the crime was committed is one which a defendant may waive, and that such right was waived in the instant case by the petitioner even if it be conceded that he should have been tried in the District Court of the

United States for the District of New Jersey.[1] (R. 47–49.)

An appeal was taken by the petitioner from this decision to the Circuit Court of Appeals for the Third Circuit. The assignment of errors filed in connection with this appeal gave no indication of the question now urged. The assignments were couched in general language and were to the effect simply that the District Court erred in not directing the discharge of the petitioner "as prayed for in said petition" for writ of habeas corpus (R. 49).

The present contention that the indictment was defective because it did not charge the interstate movement of the stolen vehicle in the words of the statute was urged apparently for the first time in the Circuit Court of Appeals (R. 54–55). That court in its opinion passed over the question whether the proceeding could not be entertained because it was an attempt merely to use the writ of habeas corpus as a substitute for an appeal and decided the question presented upon the merits.

[1] The docket entries appearing in the instant record in connection with the two indictments (R. 24, 32–34, 41–47) do not disclose any plea or demurrer prior to trial based on venue. While a series of docket entries called in the record "Chronology of Proceedings in New York Court", show that there was made at the trial on behalf of petitioner a motion to dismiss the second and third counts of Indictment 28944, and also motions to set aside the verdict and in arrest of judgment, all of which were denied (R. 43–44), the grounds of these motions are not set forth in the record. No appeal was taken from either of the judgments in the two criminal proceedings.

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After considering at length the purpose of the National Motor Vehicle Theft Act and the evil at which it was aimed, the court held (R. 58–59):

> Applying these observations to the averments of the third count of the indictment in this case as affecting interstate commerce, which are very similar, indeed almost identical, with those which were involved in *United States* v. *Drexel*, 56 F. (2d) 588, we are of opinion, in accord with the Circuit Court of Appeals for the Second Circuit, that the allegation, in the past tense, that the stolen motor vehicle had, before the sale, been transported in interstate commerce, was, if a defect, rather one of form than of substance under Section 556 of Title 18 U.S.C.A.,[2] and we are also of opinion, in accord with the thought in the *Drexel* case, that at any rate "within Section 391 of Title 28 of U.S.C.A. (28 U.S.C.A. Sec. 391)[3] if not strictly a formal it was certainly a 'technical defect' which did not 'affect the sub-

[2] This section (R.S 1025) provides that "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

[3] This section (Section 269, Judicial Code, as amended), provides that "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

> stantial rights of the parties.' ". The pleader had been inept in expressing his meaning but that meaning was clear.
>
> The third count of the indictment in this case shows that the characteristic of interstate commerce remained in the vehicle at the time of sale. The facts were, as we assume from the verdict and in default of an appeal, proved at the trial. It is, on the verdict, not disputed that the car was stolen in one district, transported to another district, there, without change of character, received by the relator, knowing it to have been stolen and transported, and by him sold, thus bringing the case on the averments of the count and on the proofs within the jurisdiction of the court that tried him.

The court accordingly affirmed the order of the District Court (R. 59–60).

ARGUMENT

While we believe that the decision of the Circuit Court of Appeals is correct (cf. *Hagner* v. *United States,* 285 U.S. 427), we submit that it is unnecessary for this Court to consider the question with which that decision dealt, a question as to which there is a conflict of decisions. The case of *United States* v. *Drexel,* 56 F. (2d) 588 (C.C.A. 8th) undoubtedly supports the position taken by the Circuit Court of Appeals in the instant case. But a contrary view was entertained in *Grimsley* v. *United States,* 50 F. (2d) 509 (C.C.A. 5th), and in *Davidson* v. *United States,* 61 F. (2d) 250, 255–

256 (C.C.A. 8th).[4] These cases, however, involved the sufficiency of a similar allegation to charge a present interstate movement of a stolen motor vehicle at the time it was received, concealed, stored, bartered, or sold where that question was presented upon an appeal prosecuted in the criminal case itself. Here the question is presented not upon an appeal in the criminal proceeding but in a proceeding for *habeas corpus.*

There can be no question that the pleader meant to charge in the allegation which is attacked that the petitioner and his co-defendants sold a stolen automobile, which they knew had been stolen, while the automobile was moving as a part of interstate commerce. That Congress has the power under the Constitution to provide for the punishment of such a crime has been decided by this Court (*Brooks* v. *United States,* 267 U.S. 432, 439), and that the District Court in which the indictment was returned had jurisdiction as a Federal court to try and to punish for such an offense as that attempted to be charged in the indictment cannot be disputed. It is evident, therefore, that the question now raised by the petitioner does not concern the jurisdiction of the trial court as a Federal court but relates merely to the sufficiency of the indictment to charge one of the essential elements of the offense attempted to be alleged. In other words,

[4] *Ventimiglia* v. *Aderhold*, 51 F. (2d) 308, a District Court decision cited by the petitioner (N.D. Ga.) did not involve the question here presented.

petitioner is attempting to accomplish by *habeas corpus* that which properly should have been the subject of an appeal in the criminal case. That *habeas corpus* may not thus be converted into a substitute for an appeal is settled beyond doubt by the decisions of this Court. Thus, in *Dimmick* v. *Tompkins,* 194 U.S. 540, 551–552, this Court said:

> It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. * * * It is not, however, necessary in this case to decide the point, *for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment.* If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be reexamined on *habeas corpus.* The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be reexamined on *habeas corpus. Ex parte Parks,* 93 U.S. 18; *In re Coy,* 127 U.S. 731; *In re Eckart,* 166 U.S. 481. (Italics ours.)

And in *In re Eckart,* 166 U.S. 481, 483, it was said:

> The case is analogous in principle to that of a trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offence against the statute claimed to have been violated. In this class of cases it has been held that a trial court *possessing general jurisdiction of the class of offences within which is embraced the crime sought to be set forth in the indictment* is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus,* because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime. (Italics ours.)

See also *Ex parte Parks,* 93 U.S. 18, 23; *Ex parte Yarbrough,* 110 U.S. 651; *In re Coy,* 127 U.S. 731, 756; *Toy Toy* v. *Hopkins,* 212 U.S. 542, 548; *Matter of Gregory,* 219 U.S. 210, 213–214; *Glasgow* v. *Mayer,* 225 U.S. 420, 428–429; *Goto* v. *Lane,* 265 U.S. 393, 401–402; *Knewel* v. *Egan,* 268 U.S. 442, 446.

A similar question was recently presented to this Court in a petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Fifth Ciruit in *Aderhold, Warden* v. *Hugart,* 67 F. (2d) 247. In that case the prisoner Hugart

was convicted under an indictment which attempted to charge a violation of R.S. 3296, which makes it an offense for anyone to conceal distilled spirits which have been removed from a distillery to a place other than a bonded warehouse without the tax being paid. The indictment failed to allege that the tax had not been paid, obviously an essential element of the offense attempted to be charged. The Circuit Court of Appeals held that this defect in this indictment did not entitle the petitioner to his release on *habeas corpus*. The same reasoning was employed in the court's opinion as we present in this case. The case was brought to this Court by the prisoner on a petition for a writ of certiorari on the ground of a conflict of decisions. The decisions alleged to be in conflict were distinguished in the brief filed by the Government in opposition to the petition for writ of certiorari, and this Court on March 5, 1934, denied the application. (No. 735, Present Term.) The *Hugart* case and the instant case are, we submit, indistinguishable.

Furthermore, in *Goto* v. *Lane*, 265 U.S. 393, 401–402, this Court said:

> In the federal courts a discharge on *habeas corpus* of a prisoner held to answer a criminal accusation or confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. *Salinger* v. *Loisel, ante*, 224; *Storti* v. *Massachusetts*, 183 U.S. 138, 143. The remedy is

> an extraordinary one, out of the usual course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the process or judgment under which the prisoner is held is wholly void.

In the instant case it is evident that, though ineptly expressed, the count in question sufficiently informed the petitioner of the offense with which he was charged to enable him to prepare his defense and to plead the judgment of conviction in bar of any further prosecution for the same offense. So far as the docket entries show (R. 24, 41), there was no request for a bill of particulars. In addition, neither the evidence nor the instructions of the trial judge in the criminal case are in the present record, and there is consequently no showing by the petitioner that either was insufficient to justify a finding by the jury, upon adequate evidence, that the sale of the stolen vehicle was the final step of a then existing interstate movement of the vehicle. Finally, it should be pointed out that the question now raised by the petitioner is obviously an afterthought. So far as the record discloses, it was not presented to the District Court which tried the petitioner; he did not make it the basis of

an appeal in the criminal case, for no appeal was taken in that case; relief was sought in the District Court in the instant case on an entirely different ground than that now urged, and the question now raised was presented to a court for the first time after the instant case had been appealed to the Circuit Court of Appeals. Under such circumstances, the language of this Court in *Grant Bros. Construction Co.* v. *United States,* 232 U.S. 647, 661, is peculiarly appropriate. In that case it appeared that the indictment failed to allege that certain acts of the defendant were knowingly done, although knowledge was an essential element of the offense defined by the statute, but this Court said:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena,* 224 U.S. 89, 96; *Campbell* v. *United States, Id.* 99, 106.

There being no showing of any exceptional circumstances which would take the case out of the general rule, we submit that the courts below did not err in holding that the writ of *habeas corpus* should not issue.

CONCLUSION

The petitioner was in no wise prejudiced by the alleged defect in the count in the indictment which

he attacks, and his objection does not involve the jurisdiction of the trial court as a Federal court. We respectfully submit that the petition for a writ of certiorari should be denied.

J. CRAWFORD BIGGS,
Solicitor General.
JOSEPH B. KEENAN,
Assistant Attorney General.
HARRY S. RIDGELY,
W. MARVIN SMITH,
Attorneys.

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